What Every Naturist Should Know About California Laws Regarding Nudity

BAKER BEACH, San Francisco

Allen Baylis, NAC board member

BEING AN ORGANIZER FOR the naturist support group of one of the most popular nude beaches in California, a board member of the Naturist Action Committee, an attorney licensed in California and experienced with California law as it pertains to nudity, I am often called upon to answer questions on the subject of non-sexualized nude use of California public lands. I also speak with naturists, law enforcement personnel, and State Park officials throughout the state.

There has been much confusion and misinformation pertaining to nudity in California, and especially in regards to the famous "Cahill Policy." This past year (2006) found me working quite hard to put out fires that were mainly the result of confusion and misunderstanding of the law in California. A common mistake of laypeople (non-lawyers) and law enforcement personnel is that they tend to read the statute that's printed in the code books (or may be found online) and fail to follow up with researching the cases that have interpreted those statutes. This is what lawyers do, and part of why we get paid the big bucks! In this article you will see several examples of why this is so important. You simply cannot understand the law without reading and understanding the cases.

I will keep the historical background down to a level that will allow the reader to understand how we got to where we are today without going into excruciating detail. I will also attempt to keep the legal jargon to a minimum, but give enough information so that the more ambitious among you will be able to find the cases and read them your-

Kathy Blanchard & Mark Storey

RCA BEACH in Marin County.

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selves. And of course, like any good lawyer, I will include a disclaimer; and here it is:

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If you were to walk up to average "textiles" on the street and ask them if it's legal to be nude in public in California, most will assume that it's not, and give an answer like, "Of course not, that's indecent exposure!" If you ask the same question of most police officers in the state, you will, not surprisingly, get the same answer.

The correct answer to that question is in fact, "It depends." Unfortunately, the law is seldom as simple as we would like it to be. The law is like the layers of an onion. You have to peel back each layer to gain a full understanding of the entire subject.

The State Penal Code

CALIFORNIA PENAL CODE(PC) section 314.1 is the indecent exposure law in California. It is the only registerable sex offense that could be at issue in a case where mere nudity is involved. When talking about California law, don't use the term "Indecent Exposure" in any other context. As I will explain below, most municipal codes that prohibit nudity use the term "public nudity" or similar language. The Penal Code section 314 states:

> *Every person who willfully and lewdly, either: 1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or, 2. Procures, counsels, or assists any person so to expose himself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the*

view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts, is guilty of a misdemeanor.

Important legal cases have established how the courts are to interpret this indecent exposure law. *In Re Smith*, 7 Cal.3d 362 (1972) for instance it was settled that simple nudity in California does not constitute indecent exposure in violation of PC 314.1. The *Smith* case concerned a man who went to a secluded beach to sunbathe nude. When he arrived in the morning, the beach was deserted. However, he fell asleep and was awakened by a police officer responding to a complaint, as by this time there were several people in the area. Smith was charged with indecent exposure, and convicted at trial.

On appeal, the California Supreme Court ruled in *Smith* that, "Absent additional conduct intentionally directing attention to his genitals for sexual purposes, a person, as here, who simply sunbathes in the nude on an isolated beach does not 'lewdly' expose his private parts within the meaning of section 314." Additionally, the California Appellate Courts have interpreted the terms *offended* or *annoyed* in cases such as *In re Dallas W.*, 86 Cal.App.4th 937 (2001) (mooning is not intended to cause sexual alarm or affront) and *People v. Archer*, 98 Cal.App4th 402 (2002) (exposing a penis during a road rage incident was intended to cause sexual affront).

These and other cases make it clear that the intended offence or annoyance must be sexual in nature. Therefore, to get a conviction for 314.1, the state must prove that the person willfully exposed his or her genitals in the presence of another person(s) who might be annoyed or offended AND that he or she acted lewdly by directing attention to his or her genitals for the purpose of sexual arousal of him or herself or another person, or to sexually offend another person.

Other important cases on the subject are *People v. Massicot*, (2002) 97 Cal.App.4th 920 (exposure of the "person" means the entire body, i.e., the nude body of the person), and *People v. Carbajal*, 114 Cal.App.4th 978 (2003) (the victim need not actually see genitals; it is enough that the defendant exposed his or her genitals to the person).

A first conviction of indecent exposure in California is a misdemeanor, and second and subsequent convictions are felonies. Every person who is convicted of indecent exposure must register as a sex offender under Penal Code section 290. For many years courts had discretion as to whether or not to require sex offender registration for misdemeanor indecent exposure convictions. However, since 2004, due to California Supreme Court rulings

and political pressure, courts no longer have that discretion, and trial courts must impose sex offender registration. The California Department of Justice has even mandated—unjustly I'd say—registration for every person ever convicted of misdemeanor indecent exposure since 1944, even though it was not imposed on them at the time of sentencing or was part of a plea agreement.

For the purposes of the indecent exposure statute, female breasts are not considered "private parts." This fact was not recognized by the California Highway Patrol officers who arrested Sherry Glaser and Renee Love during the November 7, 2005 Breasts not Bombs protest on the steps of the California Capitol building. The District Attorney, understanding that the women had broken no law, refused to prosecute them, and dismissed all charges against them. Again, law enforcement officers often do not understand the laws we pay them to enforce.

Lewd Conduct

LEWD CONDUCT HAS BEEN a contentious aspect of the law for naturists at California beaches. As any naturist knows, allowing lewd or sexual conduct to take place unabated at a clothing-optional beach is a quick and certain path to getting the beach closed to nudity. The California Penal Code section 647 addresses lewd behavior as follows:

> *Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: (a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view.…*

As you can see from the above language, one can read the statute and have absolutely no idea of exactly what conduct the law proscribes. Fortunately, the California Supreme Court thought so too, and with good cause. For years, police charged people with violating PC 647(a) for engaging in any conduct they found to be unacceptable. This is one of the best examples of a "void for vagueness" statute I can think of. In *Pryor v. Municipal Court*, 25 C3d 238 (1979), the California Supreme Court found that PC 647(a) was unconstitutional because an average person could not read the statute and come to a conclusion as to what conduct it prohibited. Then why is it still on the books? Well, when courts find a law to be unconstitutionally vague, they are allowed, and *required* if possible, to give it an interpretation that will preserve its constitutionality.

The Court did that, and the California Jury Instructions now say (and I'm paraphrasing), that to get a conviction for violating Penal Code section 647(a), the state must prove that the person willfully engaged in the touching of his or her own or another person's genitals, buttocks, or female breast; did so with the intent to sexually arouse or gratify him or herself or another person, or annoy another person; in a public place or place open to public view; and, at the time someone else who might have been offended was present; and, he or she knew or should have known that another person who might have been offended by the conduct was present. Lewd conduct under Penal Code 647(a) is not *currently* a registerable sex offense. However, under a recently enacted change to the sex offender registration law, a judge may impose registration on persons convicted of any crime if the judge finds that the crime was committed as a result of sexual compulsion or if there was a sexual element to the crime.

Nude on the Beach?

SO, HOW DOES THIS affect naturists at nude beaches? Some conduct clearly violates PC 647(a). When people engage in sexual intercourse, oral sex, or masturbation, it's perfectly clear that these activities constitute lewd conduct. But, if I am applying sunscreen to my penis or my wife's breasts, is that lewd conduct? As with so many things relating to nudity, the letter of the law and what you can do without being harassed

Bill Coles

Mark Orpen

Mark Orpen

ONE OF THE MORE popular beaches in California is Black's Beach, seen on this and adjacent page.

Mark Orpen

Mark Orpen

Naturist Society

by law enforcement officials are often two different things. For example, when does a man applying sunscreen to his penis "cross the line" and constitute masturbation? As naturists, we don't believe that applying sunscreen to the elbow should be treated any differently than applying sunscreen to the penis, and that it shouldn't make any difference whether the man is applying the sunscreen to himself or if someone else does it for him. Reading the law as interpreted in *Pryor v. Municipal Court*, and assuming that there is no intent to sexually arouse or gratify oneself or another, this is a reasonable conclusion, and the letter of the law. Do law enforcement personnel, such as State Park rangers, see it differently? They often do. A recent case illustrates the point. In the famous words of Jack Webb, "the names have been changed to protect the innocent."

Naturists Art and Barbara were regular visitors at a clothing-optional California beach. Late in the long summer day, after boogie boarding and sunbathing, Art and Barbara decided that they needed to apply more sunscreen to each other. A park ranger was watching them through binoculars from his vantage point on the bluff. As soon as the ranger saw Barbara applying sunscreen to Art's penis, he immediately went to his truck and drove down to beach. He contacted them, and cited them for not only lewd conduct, but also for indecent exposure. Needless to say, this was a huge problem for the naturist couple.

Over the past few years at the same State Park, I have spoken with a few of the rangers who suggested their interpretation of the law was that when either or both of the parties are nude, any person applying sunscreen to any part of the another person constitutes lewd conduct. By reading the law, including the cases on the subject, anybody should be able to tell that this is a misjudgment. After I explained the state law to the rangers, they still said that they considered any touching of the prohibited parts of another, even for the purpose of applying sunscreen, to be lewd conduct, because people could apply the sunscreen to those body parts themselves (still an

GREY WHALE COVE

MUIR STATE PARK with the small clothing-optional Muir Beach in background.

incorrect reading of the law). After Art and Barbara spent many thousands of dollars (and with excellent work on the part of their defense attorney), the judge struck the indecent exposure charges for lack of a "victim," and the jury found them not guilty on the lewd conduct charges. However, nobody should be run through the criminal justice ringer because law enforcement personnel don't understand the law. As an end note to this story, I will add that after this case was concluded, park management transferred the Ranger in question to a different State Park; one without a clothing optional area.

State Park Regulations and the Cahill/Harrison Policy

MOST NATURIST AND California State Park personnel have heard of the "Cahill Policy." I have heard many naturists refer to it as the "Cahill Decision," and many naturists and Park rangers alike will tell you that under "Cahill," nudity in the State Parks is "illegal but tolerated." Few people in either group, however, fully understand the importance and impact of the policy, and the legal implications of everything that has happened since May 31, 1979, when State Parks Director Russell Cahill sent his famous memorandum.

Naturally, the memo didn't appear out of a vacuum. In the years following the ruling in *Smith*, nude beaches started to spring up all along the California Coast, some of them being in State Parks. Notable examples are Black's Beach and San Onofre, both in San Diego County. Given that the California Code of Regulations allows the Parks Department to designate clothing-optional areas, naturists decided to petition the Parks Department to do so within the park system.

Prior to issuing the memo, Cahill held at least three public hearings in different areas of the state. As the memo says, there was considerable opposition from law enforcement to the designation of any clothing-optional areas. In the end, the policy stated in the memo is a compromise. However, by declining to designate any clothing-optional

areas, Cahill actually did naturists a favor. The areas that Cahill proposed to designate were very remote, nearly impossible to get to, and didn't include any of the then existing traditional clothing-optional beaches.

The California Code of Regulations addresses the rules and procedures California Parks Department personnel must follow. The code (Title 14, section 4322) that pertains to nudity at State Parks says the following.

> *Nudity. No person shall appear nude while in any unit except in authorized areas set aside for that purpose by the Department. The word nude as used herein means unclothed or in such a state of undress as to expose any part or portion of the pubic or anal region or genitalia of any person or any portion of the breast at or below the areola thereof of any female person.*

CCR 14-4322 is a public nudity regulation and should not be confused with indecent exposure. As such it is not a registerable sex offense. On its surface, Section 4322 appears to be a prohibition of nudity in the State Parks unless there is an "official" designation. However, this section cannot be fully understood without consideration of the longstanding policies of the California Department of Parks and Recreation and the judicial opinion interpreting them.

In 1988, the Appellate Division of the Placer County Superior Court interpreted the "Cahill Policy" in the case, *People v. Eric John Bost* (County of Placer, Appellate Department No. 75689 May 16, 1989). The *Bost* case arose out of an incident at the traditional clothing-optional area on Folsom Lake known as Bear (or "Bare" by some locals) Cove. Essentially, Eric John Bost was cited for violation of CCR 4322, by a ranger who failed to follow the procedures set out in the Cahill memo. Over his objections, Bost was convicted in the trial court. Fortunately for us, Bost appealed his conviction to the Appellate Division of the Placer County Superior Court. The appellate court found that the public has a right to rely on what it termed external indicia of Department enforcement policies, such as the Cahill memo and other published information. The court held that the Parks Department's implementation of the Cahill policy and longstanding tradition of allowing clothing-optional use in established sites created a conditional designation of traditional clothing-optional areas. The *Bost* ruling said, in part,

> *First, we conclude that, though the 1979 Cahill policy eschews an intention on the part of the Department to designate clothing optional beaches, the subsequent enforcement practices and policies of the Department have resulted in the* ***designation*** *of certain areas as "clothing optional", Bear Cove is such an area. Secondly, we conclude that the department has availed itself of the discretion granted it by the legislature to make the clothing optional use of these beaches conditioned upon the absence of citizen complaint to law enforcement officers. We also conclude that a reasonable construction of this policy which is consistent with legislative intent and the policies and practices established at the trial is that a warning to discontinue nude activities cannot be construed to be a ban "forever" of the future pursuit of nude activities at the state park. We find that the policy contemplates that an individual may return to the same location on a subsequent day after a complete cessation of nude activities on request of an enforcement officer.*
>
> *This construction meets the two elements of due process notice required by* Burg *and similar cases* [*Burg v. Municipal Court* (1983) 35 Cal.3d 257 addressed the issue of "fair notice" as it relates to the due process doctrine]. *By reading the long-applied policy as a* ***conditional designation of clothing optional beaches****, the public receives fair notice that clothing optional activities like "skinny dipping" are permitted only at recognized locations within the state parks, unless a request for cessation of such activities is made by an enforce-*

Allen Baylis

HIKING IN Angeles National Forest.

Dave Cole

PIRATES COVE

Original letter by Russell Cahill to all Division/Office Chiefs, all District Superintendents, and all Area Managers:

No clothing-optional beaches will be designated within the California State Park System at this time. During the public meeting process, it became clear to me that the public is extremely polarized on this issue. It also became clear that there is a serious concern on the part of clothing-optional beach opponents about the extra costs of patrolling beaches so designated.

Proponents' arguments that a few miles of beach be set aside for their use were pervasive. However, serious opposition from legislators, county supervisors and local governing bodies lead me to believe that designating such areas will focus opponents' attention upon what seems to be a victimless crime at worst, and certainly an innocuous action.

The cost of extra services argument is a good one. Therefore, it shall be the policy of the Department that enforcement of nude sunbathing regulations within the State Park System shall be made only upon the complaint of a private citizen. Citations or arrests shall be made only after attempts are made to elicit voluntary compliance with the regulations. This policy should free up enforcement people to concentrate on other pressing duties.

Russell W. Cahill
Director of California Department of Parks and Recreation
May 31, 1979

ment officer upon public complaint. Upon such warning, the activity must stop for the day. By prohibiting the activity for the balance of the day, it is likely that the skinny dipper and complaining party will not encounter one another again, thus serving the purpose of the "Cahill policy" in a rational, easily understandable way.

This construction also fairly advises law enforcement and prosecutors of how the law is to be enforced. ***So long as the activity takes place in a traditionally recognized area, it is legal unless and until a complaint from a member of the public is received.*** *Upon such complaint, a warning is to be issued and, if not heeded, a violation has occurred. Further activities of a person so warned are prohibited for the balance of the day, but activities on later days are proscribed only if preceded by a new public complaint and renewed warning.* [Emphasis throughout by the author.]

Bost is not binding precedent on courts outside Placer County. However, on June 14, 1988, after the *Bost* decision, Department of Parks and Recreation Deputy Director Jack V. Harrison wrote a letter to Cec Cinder, then of the Western Sunbathing Association, stating that the Parks Department concurred in the holding of the *Bost* Court and declined to appeal the decision. This is extremely important, as it essentially binds the State Parks to following the ruling in *Bost*!

One of the important issues the *Bost* Court discussed is the concept of fair warning of a statute's or regulation's meaning, and the Parks Department enforcement policy regarding Regulation 4322. So, on June 14, 1988, the Department adopted the ruling in the *Bost* case as its policy. This is the law in the State of California, and the policy of the Parks Department. Naturists who enjoy the many traditional clothing-optional sites within California State Parks are operating within the law. It should also be noted that PC Section 4322 specifically includes a provision authorizing the Parks Department to set areas aside for clothing-optional use.

I have been working—oftentimes in my NAC capacity—with State Park officials and California naturists to secure official designation of some traditional clothing-optional beaches. However, there are several significant hurdles to overcome. One of those hurdles is educating State Park officials and rangers about the current legal status of the traditional areas. Many State Park officials and rangers are stuck in the "illegal but tolerated" mindset. This hinders progress, because naturists are often perceived as law breakers who must be tolerated, rather than law abiding citizens enjoying a legitimate recreational choice.

Local City and County Ordinances

MANY CITIES AND COUNTIES have enacted public nudity ordinances. These do not address registerable sex offenses, and such activities are not classified as "indecent exposure." These local ordinances may classify such actions as misdemeanors or infractions, and fines generally range from $50 to $500. Prior to the California Supreme Court's ruling in *Smith*, most incidents of simple public nudity were charged as, and many people were convicted of, indecent exposure. However, some cities that were paying attention moved quickly to pass anti-nudity ordinances to "fill the gap" left by the *Smith* decision. By the late 1970s, several cities and counties had ordinances on the books intended to protect the public from the possibility of suddenly having thousands of naked people walking the streets.

One may ask how a city can prohibit nudity when in *Smith*, the California Supreme Court ruled that simple nudity is not lewd, and therefore does not violate the state law of indecent exposure. The answer is that municipalities can still pass their own ordinances prohibiting simple nudity. In this situation, the prosecution does not have to prove lewd intent in order to get a conviction as they would in a prosecution under state indecent exposure law. For example, Mono County Code Section 10.20.030 states, "This chapter shall apply to all nudity regardless of whether it is sexually motivated or otherwise lewd." Local ordinances vary quite a bit in their wording and in the justification or

findings supporting their passage into law. Generally, they prohibit simple nudity in any public place or place open to public view. Some ordinances even prohibit nudity in a place that is not open to public view, if the offender can be seen from another private property. The courts have interpreted the terms *public place* and *public view* rather broadly. So even nudity in a rented gym or pool could be considered a public place if members of the public are allowed in, even if the nudity can't be seen from outside the facility. These laws were challenged in 1975, and a California Court of Appeals found them to be valid. (See *Eckl v. Davis*, 51 Cal.App. 3d 831.)

A new wave of anti-nudity ordinances popped up across the nation as cities and counties enacted anti-nudity ordinances in order to place limits on adult businesses like strip clubs. This was a result of the U.S. Supreme Court rulings in *Barnes v. Glen Theatre, Inc.* 501 U.S. 560 (1991) and *City of Erie v. Pap's A.M., tbda*

Mark Storey

PERLES BEACH in the San Francisco Bay.

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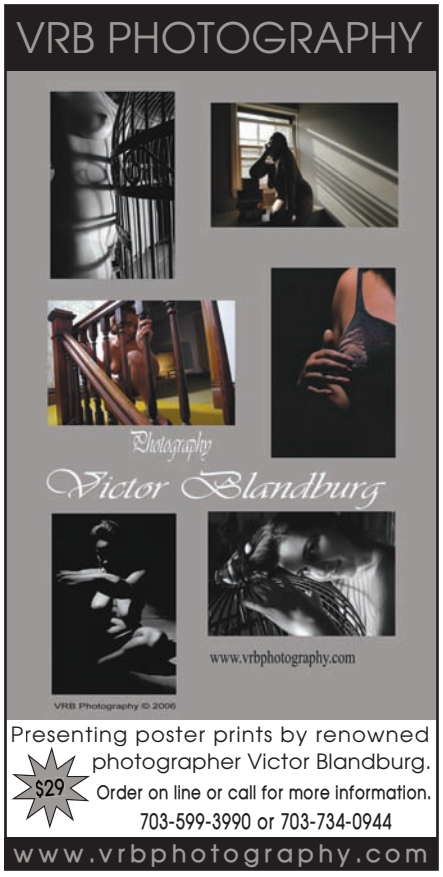
LIMONTOUR BEACH in Marin County.



"Kandyland," 529 U.S. 277 (2000). These cases essentially ruled that in order for a city to clear First Amendment challenges, and to prohibit nudity in strip clubs, the law prohibiting nudity had to be a content-neutral prohibition of all public nudity, not just a prohibition of nude dancing in the strip clubs. A discussion of this area of the law is beyond the scope of this article.

To get a picture of how the layers come together, consider the case of a nude hiker in a National Forest area within Los Angeles County. Brian Kraemer had been hiking nude in the Angeles National Forest near his home for about 12 years. The local National Forest Service rangers knew him and never bothered him about his nudity. However, last year a newly-hired Forestry Technician saw Brian hiking nude and warned him that he was breaking the law and that he would call the Sheriff's Department if he saw him nude in the area again. The Forestry Technician also complained to the district's head ranger, who decided to check on the legal status of nude hikers in the area.

Brian contacted me to inquire about the legal issues involved. I provided some information that he could take to the ranger so as to clear up the problem. However, rather than taking Brian's word for it, the ranger contacted the local Sheriff's office. A Sheriff's deputy misinformed the ranger that nude hiking was illegal, and that if anybody were seen hiking nude, the Sheriff's Department would apprehend them, using a helicopter if necessary.

I wrote to the captain of the local Sheriff's station explaining the law of indecent exposure, the *Smith* case, and the jury instructions for Penal Code section 314.1. I also cited the county ordinances that prohibit nudity only in County Parks and Beaches, and I concluded with the following: "Outside of any Los Angeles County Park, in unincorporated sections of the Los Angeles County and on federal land such as the Angeles National Forest, there is no law prohibiting simple nudity. I will suggest that spending valuable law enforcement resources to apprehend unclothed hikers in such areas would not be a prudent use of county assets." A few weeks later, I received a letter from the Sheriff's Department stating that they had researched the subject and told me that

> *Their research revealed that simply being nude in the Angeles National Forest is not prohibited by law. Therefore, your client appears to be within his legal rights to hike in the forest in the nude. Altadena Station Deputies will be briefed that simply hiking in the forest, in the nude, is not a violation of the law. They will also be briefed about section 314.1 of the California Penal Code to ensure that law is being properly enforced.*

As you can see, there are ample opportunities for misunderstanding the laws regarding nudity in California. Even in cities or counties where there is no local law prohibiting nudity in public, you can't expect to be able to walk around town naked without being harassed or illegally arrested. However, the work being done by naturists around the country willing to make a public stand for nude use of public lands will go a long way toward bringing North America out of the shadows of our body-phobic times. A right not exercised is a right lost. ***N***

For the complete texts of many of the court decisions referred to in this article, see the Toni Egbert Naturist Law Library at www.naturisteducation.org. *Most cities and counties have posted their ordinances and codes on the Internet. Therefore the best place to start looking for local laws pertaining to nudity is to go to the municipality's Web site. Many municipalities use one of several Web publishers to post and update their codes. Try looking on one of these Web sites:* www.municode.com, www.amlegal.com/library, www.igs.berkeley.edu/library/calcodes.html, www.qcode.us/codes, www.qcode.us/codes.htm, www.sterlingcodifiers.com/onlinecodes.htm, www.codepublishing.com/municodes.html, *or* www.bpcnet.com/codes.htm.